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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1298~~ 125

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Bureau of Motor Vehicles,

Appellee.

STATEMENT AS TO JURISDICTION

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STATUTE INVOLVED

New York Vehicle and Traffic Law,
Section 501(1)(a) 2, 5, 6, 7, 9
Section 510(3)(c) 3, 7

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No. .....

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Bureau of Motor Vehicles,

Appellee.

STATEMENT AS TO JURISDICTION

Opinions Below

The Court of Appeals wrote opinions. The majority opinions and the dissenting opinion of three judges are appended hereto as Appendix A. Neither the Appellate Division nor the court of original jurisdiction wrote any opinions.

Jurisdiction

(i) This case arises from a judgment entered in the Supreme Court of the State of New York, County of New York, which denied appellant's application to review the determination of the appellee. The appellee had determined to reject the application of Kemp for an operator's license to operate a passenger automobile for his own pleasure. The rejection was rested on the appellant's

character, having nothing to do with his competence to safely operate a motor vehicle on the highways.

(ii) The judgment of the Court of Appeals affirming by a 4 to 3 vote the determination of rejection was made and entered March 31, 1966, Appendix B.

The Court of Appeals granted an order on April 28, 1966 amending its remittitur to include the following:

> "Motion to amend the remittitur granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle, e.g., for not disclosing his entire record of convictions, violated his rights under the privileges and immunities clause of the Fourteenth Amendment as well as his rights under the due process clause of that amendment rights under the due process clause of that amendment. The Court of Appeals held that petitioner's constitutional rights had not been violated."

The Notice of Appeal to this court was filed on April 29, 1966 in the Supreme Court of the State of New York, County of New York, the court possessed of the record.

(iii) Jurisdiction is conferred on this court by 28 U.S.C. Section 1257(2).

Statutes Involved

The statutes involved are:

New York Vehicle and Traffic Law, Section 501(1)(a):

> "An application for a license to operate motor vehicles, as an operator or chauffeur, may be made, by mail or

otherwise, to the Commissioner or his duly authorized agent upon blanks prepared under authority of the commissioner and an applicant shall furnish such proof of his fitness as the commissioner shall in his discretion determine. . . .

• • • •

Before a license is granted, the applicant shall pass such examination as to his qualifications as the commissioner shall require."

New York Vehicle and Traffic Law, Section 510(3)(c):

"Permissive suspensions and revocations. Such licenses and certificates of registration and the privilege of a non-resident of operating a motor vehicle or motorcycle in this State . . . may be suspended or revoked.

• • • •

(c) Because of the conviction of the holder at any time of a felony; . . ."

Questions Presented

1. Do the statutes as construed below violate the privileges and immunities of Kemp by barring him from the use of the highways because of his prior criminal record, totally unrelated to the operation of a motor vehicle?

2. Do the statutes as construed violate appellant's privileges and immunities by making character a test of fitness to operate an automobile for one's personal use?

3. May the use by appellee of the prior convictions of Kemp for offenses having no relation to his ability to operate a motor vehicle be used to deprive him of a license to operate an automobile without denying due process to him?

4. May the appellee interfere with interstate commerce by withholding an operator's license based on the character of the applicant?

5. Was appellant denied the privileges and immunities of a citizen of the United States and denied due process of law by a construction and application of the statutes by the Court of Appeals attempting to justify the denial of a license because the appellant had omitted (without any showing of wilfulness) from his application for the operator's license of a conviction for a trespass when he was 15 years of age although he did disclose in the application convictions for assault and murder?

6. Was appellant denied the privileges and immunities of a citizen of the United States and denied due process of law by a construction of the statutes by the Court of Appeals wherein the Court of Appeals injected as a ground for denial of the operator's license, the fact that appellant had omitted the aforesaid trespass conviction, although appellee Commissioner did not rest his determination on that ground?

7. Was appellant denied the privileges and immunities of a citizen of the United States and denied due process of law by a construction of the statutes by the Court of Appeals wherein the Court of Appeals stated as a ground for denial of the operator's license, the fact that appellant had omitted the aforesaid trespass conviction, although the Commissioner was not prejudiced by the omission and possessed, through routine investigation, the information concerning the alleged trespass conviction?

8. Is not the statute, as construed by the Court of Appeals, an impermissible bill of attainder?

Statement

The appellant, a person of about 38 years of age in 1965, applied for a license for operating a motor vehicle. In his application he disclosed that in 1947 and 1961 he had been convicted for crimes. Neither of the convictions related to the manner of the operation of a motor vehicle. Because of his criminal record alone, the appellee rejected his application.

In order that the statement of facts be free from confusion, it is necessary to point out that prior to appellant's application for an *operator's* license, he had applied for a chauffeur's license, which also had been denied for the same reason. But that rejection is *not* the subject of this proceeding.

The appellee's rejection of the application for an operator's license is alleged in paragraph "5" of the petition which sets forth the Commissioner's letter in which he speaks of Kemp's record "which discloses disregard for law." This is admitted in appellee's affirmative defense found in paragraph "Thirteenth" and Exhibit G annexed to it; also in Exhibit M. These are amplified by the Commissioner's affidavit in which he states: "This conclusion was based upon the fact that petitioner's background and record disclose a consistent disregard for the law up to the time of his release from jail in November, 1964. This disregard for the law is especially evidenced by his convictions for Murder and Assault. Those convictions indicate a lack of respect and consideration for the rights and personal safety of other people. If this lack of consideration were to be transplanted onto the public highways of this State, there would be substantial risk that the petitioner would endanger the personal safety and property of other persons using the highways • • • On the basis of these considerations, I concluded that the petitioner was not a fit person within the meaning of Vehicle and Traffic Law

§ 501 (i) (a) to have a license to operate a motor vehicle at the present time" (R. pp. 43, 44).

So that there could be no doubt, the appellee makes clear that the ground for the appellant's rejection was his criminal record, of the assault and murder charges. The appellant's "propensity to disregard the law in the other areas of conduct" (apellee's affidavit) can in this record refer to his conviction for trespass in Mississippi in 1942, when he was 15 years of age (Exhibit L of Answer). There were no other convictions. The murder charge in Mississippi in 1947 (a felony), when petitioner was 20 years of age, was the killing of his father-in-law; paroled in 1957. The assault conviction in 1961 (a misdemeanor) was the stabbing of a paramour (Exhibit N); paroled in 1964.

None of these crimes involved the manner of the operation of a motor vehicle.

It is necessary that this Statement should emphasize that the Commissioner did not reject the appellant because of any incompleteness or omissions in his application. The pleadings and affidavit of the appellee show beyond dispute that the sole reason the application was rejected was because the Commissioner felt that the criminal record of Kemp showed that he was unfit to operate an automobile for his own use. (R. 11 Answer, SECOND admits allegation "5" of Petition R. 8; and Affidavit of the Commissioner R. 43 where after stating that prior convictions indicate a disregard for law, he states, "on the basis of these considerations, I conclude that the petitioner was not a fit person, within the meaning of Vehicle and Traffic Law § 501(1)(a), to have a license to operate a motor vehicle at the present time.")

The opinions of the majority of the Court of Appeals insofar as they inject this additional factor, is erroneous as to fact. First, the Commissioner did not reject the appellant because he had not disclosed his complete record. Sec-

ond, the opinion of the majority states that Kemp omitted his conviction for burglary. There is no conviction for a burglary. The Record (Ex. L.P. 38) shows that there had been an arrest and investigation of a burglary; that is all. As for the omitted conviction for trespassing in 1942, Kemp was 15 years of age at the time (at the time of his application he was 38). As for the memorandum of Judge Keating in stating that Kemp had omitted the conviction for murder on his prior application, the answer is that the prior application has no bearing on the present application. In the present application he stated that he had been convicted for assault and murder.

Suffice it to state, in either application there was no materiality of the claimed omission because there could not have any prejudice to the Commissioner. The Commissioner states in his affidavit (R. 43) that when the prior application disclosed a conviction he immediately made an investigation as a matter of routine and learned of Kemp's entire record. Therefore, he could not have been prejudiced at any time. And when Kemp again applied, he had the entire record before him.

The Commissioner therefore in denying the application said not a word about any incompleteness in the application. He rested his denial solely on his decision that the criminal record showed unfitness to operate a motor vehicle. And his counsel argued further that because Section 510(c)(3) authorizes a revocation of a license upon conviction for a felony, Section 501(1)(a) must be construed to authorize rejection because of a prior felony conviction.

The sole quarrel therefore between Kemp and the Commissioner was that the Commissioner asserted a right to reject an applicant based on his character, his criminal record. Kemp, however, asserts that such a power runs afoul of the Federal Constitution, if the character test had no relation to the ability to operate a car.

Stage and Manner of Raising Federal Questions

The repugnancy of the New York statutes to the Federal Constitution was raised at the very inception of these proceedings by the Petition (R. 10, paragraphs 10, 11, 12, 13 and 14).

The questions were raised and passed upon in the Court of Appeals, as its opinions, both majority and minority indicate; and as its certificate so shows. As for the latter, it should be emphasized that appellant contended that his constitutional rights would be impaired if the license were denied for reasons not directly related to his ability to operate a motor vehicle. The certificate states, "Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle." The example ("e.g.") given by the certificate, "for not disclosing his entire record of convictions" is a misplaced emphasis. The emphasis (as the minority opinion of Chief Judge Desmond and Judges Fuld and Van Voorhis makes clear) is that the denial of the license based on his record of prior convictions not directly related to his ability to drive was a denial of his constitutional rights. To additionally deny the license because of failure to give a complete record, especially as in this case when no prejudice resulted therefrom, would also be a denial resting on character.

The Questions Are Substantial

The substantiality of the issues is presented by the dissenting opinions of Chief Judge Desmond and Judges Fuld and Van Voorhis when they said:

> "DESMOND, CH. J., FULD and VAN VOORHIS, JJ.:
>
> We dissent and vote to reverse and to grant the relief asked by petitioner on these grounds: first, that section 501 (subd. 1a) of the Vehicle and Traffic Law does not authorize the Commissioner to investigate an

> applicant's character or morals but only his 'fitness', i.e., his ability to drive a car; second, that, as construed by the court, the statute is unconstitutional as a delegation of legislative power without standards (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184); and third, that the statute, as now construed and applied, violates the 'privileges or immunities of citizens' provision of the Fourteenth Amendment to the Federal Constitution since it interferes with the common right to use the public highways (see *Williams* v. *Fears*, 179 U. S. 270, 274)."

Section 501(1)(a), as construed by the majority authorizes the Commissioner to pass upon an applicant's morals and character and may reject an applicant on that account. We contend that such a construction violates appellant's privileges and immunities under the Federal Constitution because it interferes with his right to use the highway and also interferes with interstate commerce. We also contend that such a requirement would deny him due process of law. We also contend that any injection by the court below of the omission of the trespassing conviction in the present application as justification for the denial of an operator's license is an impairment of Kemp's constitutional rights under the same clauses.

1. Appellant, Kemp, has been deprived of his privileges and immunities as a citizen of the United States. The appellant is a citizen. He has sought to use the highways through the medium of a motor vehicle. In order to operate a motor vehicle on the highways he must possess a license to do so. Such a license has for its purpose the regulation of the use of the highways by persons who can safely operate a motor vehicle and to identify the operator and to indemnify other users against the operator's incompetence.

In *Matter of Wignall* v. *Fletcher*, 303 N. Y. 345, and *Matter of Moore* v. *MacDuff*, 309 N. Y. 35, New York held

that an ordinary operator's license is not a mere privilege, but a right.

In *Williams* v. *Fears,* 179 U. S. 270, 274, this court said:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

In *Edwards* v. *California,* 314 U. S. 160, the Court held that the right to move from place to place was an attribute of national citizenship.

In that case it was sought to circumscribe the movement of "indigent" people. The prohibition was directed against the character of the person who sought to move about. Yet, it was held that the character of a person could not be used as a test of his right to move about. That stricture applied to the person seeking to move about, whether on foot, on horseback or in a carriage.

Had a character test been devised to qualify a person to use the highways on foot, such a test would readily have met constitutional doom. What difference is there in principle when the use is by horse, carriage or automobile? In each case the use of the highways is sought.

The decisions of this court therefore clearly point in one direction, that character cannot be used as a test for determining a person's right to move about.

To any assertion that the prior convictions of this petitioner has a bearing on the safety of persons using the highway because a motor vehicle may be used in furthering criminal activities, the answer is that the commission of a crime does not require the use of a motor vehicle. Crimes of any sort may be committed by per-

sons on foot. Yet would it be regarded as constitutional or reasonable to require persons on foot to obtain a license based on their character in order for them to use the streets?

Moreover, what basis is there for assuming that a person who had been convicted of a crime will again commit one? The conviction and punishment of persons in the administration of criminal law rests on the principle that convicting a person for his crime and punishing him will result in a reformed person, who will not return to evil ways. Therefore, a supposition that the former convict must be specially treated and even denied a license has little rational support. The assumption has no support in constitutional law since what is inferred is contrary to reasonable experience. *Bailey* v. *Alabama*, 219 U. S. 219, 234, and merely provides a type of bill of attainder.

The Commissioner contends that he may reject the license of one seeking the use of the highways on the basis of prior convictions for crime (and this could apply to a record based on misdemeanors as well as felonies) because such convictions show a disregard for law, and therefore will reflect upon the ability to safely operate a motor vehicle. This argument is not supported by any scientific evidence. The observation of the Commissioner is not supported by experience. The facts of life on the contrary show that a person can be the most law-breaking person, yet be an excellent and careful driver. The converse is also true, that many of the most law-abiding persons are habitual violators of motor vehicle laws and regulations.

What does the Commissioner mean when he says that the convictions for murder and assault indicate a lack of respect and consideration for the rights and personal safety of other people? If it means that his emotional state in committing crimes against certain persons will

necessarily be transferred to his manner of operating a motor vehicle, he has skipped a vital link and that is, etiological proof that one follows from the other. It is not enough to rest a denial of a person's constitutional rights to use highways, intrastate and interstate on a bald assertion. The burden of proof to sustain such a denial is on the Commissioner.

The Commissioner's hesitancy in this respect is evident in his affidavit statement, "*If* this lack of consideration were transplanted onto the public highways of this State * * *." The "if" is a big word. It must be demonstrated that it will be transplanted. He merely assumes it from guesswork or hunch. The fact that he is a commissioner does not entitle him to state conclusions which another person would have to prove. And since he has denied a citizen of the United States of his rights he has to justify his reasons scientifically. Nor can he rest on the routine ritual that it was the "exercise of his judgment and discretion." Fortunately, the Constitution of the United States which is invoked in this case requires more than the recitation of the ritualistic terms.

The Commissioner's attempts to avoid the invalidity of his conduct by the excuse that a criminal record shows a disregard for law and therefore unfitness to drive a car, is plainly disingenuous. If the convictions affect the ability to drive safely, then how can he attempt to mitigate his determination by stating that the rejection is for "the present time" (R. 44 first complete paragraph). If the defect resulting from the criminal record results in unsafe driving, it cannot be said that it is a defect and disqualification for "the present time" only. The answer is that the Commissioner when faced with this challenge to an assumed power to reject because of a criminal record, sought some respectable cover, and seized upon the thin "disregard for law" shelter. This led him into the contradiction just exposed.

2. The appellant has been denied a license because of his former convictions. This factor has no relation to his ability to drive a car. In fact, the record shows that appellant was found competent to drive (R. 9 par. 8).

Because the denial of the license rested on reasons other than his qualification to drive a car, Kemp was denied due process. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238, which, among other cases therein cited, hold that a rational connection must exist for the deprivation of a license, and the grounds must be related to the activity for which the license is sought.

3. Although the record does not show that Kemp presently needs a car for crossing state lines, nevertheless, it can be reasonably anticipated in these days of interstate communication that sooner or later such need may be felt. Since he has been denied a license with no right to ever get one (any other grant would be one of *favor* by the appellee), there is an interference with use of a car for such purposes.

Modern highways know no state barriers in the context that one flows into the other. A traveler in New York may be in New Jersey, Connecticut or Pennsylvania in a matter of minutes. Without a license, appellant is deprived of the opportunity of using the highways as a part of interstate communication and thus, there is an interference with interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Mitchell* v. *United States*, 313 U. S. 80.

This Court in the *Edwards* case held that the interference with the travels of "indigent" persons across state boundaries was a burden on interstate commerce. What was said there, applies here.

4. Likewise, any rejection because of the omission by appellant of his conviction for trespassing would likewise

operate to deprive him of his constitutional protections. It has been shown that the opinion of the Court of Appeals is in error in stating that Kemp also omitted a conviction for burglary—such conviction is non-existent. The Court of Appeals injected this element into the case, although it was not the basis for the rejection by the Commissioner. The record is clear beyond dispute that the denial of the license rested solely on the conviction record of Kemp. Nevertheless, the arguments made with respect to the denial resting on the conviction record, apply here. The denial of the application because of the omitted conviction for trespass is also one based on the character of the applicant.

5. The statute does not authorize a rejection because of an incomplete application. From a practical point of view, if an application is incomplete, the Commissioner could insist upon its completion. He did not do so; instead, he denied the application for a different reason. The only penalty provided by statute is one of misdemeanor for making a false statement, Vehicle and Traffic Law, Section 392. The Commissioner has not asserted such a penalty against appellant or even claimed his application to be false.

6. Moreover, since the appellee seeks to exercise a power to reject because of a criminal record, and such exercise is unconstitutional, the information sought concerning prior criminal convictions is irrelevant. The withholding of a license for irrelevant questioning thus operates as a penalty and is a denial of due process. *Kent* v. *Dulles,* 357 U. S. 116. *Chaunt* v. *United States,* 364 U. S. 350.

7. The Court of Appeals majority memorandum of three judges recognizes that the withholding of a license does not provide a limit of time appellant may be deprived of his right to use the highways. The opinion said there is discretion in the Commissioner, but does not state for how long

he may withhold. This without more, is a denial of due process, since it permits the Commissioner to determine for himself how long it may be before Kemp may use the highways. The use tomorrow may be of great importance to Kemp. Yet the decision of the three judges permits the appellee to withhold the use for an undetermined time.

CONCLUSION

Review should be granted because this case presents a novel case, decided by a 4 to 3 vote of the New York Court of Appeals. We have shown that Kemp has been deprived of his right to use the public highways by automobile because the Commissioner did not think him a fit person to do so merely because of appellant's record of previous convictions unrelated to the operation of a motor vehicle.

Respectfully submitted,

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EXHIBIT A

Opinions.

The order of the Appellate Division should be affirmed. The record before us demonstrates that, on his application for an operator's license, the petitioner did not disclose his entire record of convictions, i.e., he merely divulged his convictions for murder and assault, omitting those for burglary and trespassing. We hold this concealment, although it is not directly related to petitioner's fitness to drive an automobile, is a legitimate ground upon which the Commissioner may exercise his broad statutory powers and deny the petitioner an operator's license, without violating any of the petitioner's rights under the Federal Constitution.

Even if we were to consider the question whether the Commissioner abused his discretion in denying this application, we would hold that there was no abuse of discretion (see *Matter of Funaro* v. *Hults*, 16 A D 2d 654). However, this is not to say that the Commissioner may deny petitioner a license for an indeterminate period of time merely because of the two felonies and the false statements on this application and on a previous one. The time may come when a denial by the Commissioner may be classified as arbitrary; but under the facts before us now, there was no such abuse of discretion.

KEATING, J. (Concurring):

I agree that the order of the Appellate Division should be affirmed.

The Commissioner has ample power to require information concerning an applicant's criminal background since, in my view, criminal conduct is reasonably related to an applicant's "fitness" to operate a motor vehicle. Fitness includes conduct which indicates a general disregard for

the law and for the safety of others. Petitioner's criminal record discloses a 1940 conviction for burglary, a 1947 conviction for murder, and a 1961 conviction for assault. These substantive crimes are sufficient justification for denying petitioner's application for an operator's license at the present time.

In addition, petitioner's concealment of his conviction for murder on his prior application for a chauffeur's license and his concealment of his burglary conviction on this application justified the Commissioner's exercise of discretion in denying the present application for an operator's license.

DESMOND, CH. J., FULD and VAN VOORHIS, JJ. (dissenting memorandum):

We dissent and vote to reverse and to grant the relief asked by petitioner on these grounds: first, that section 501 (subd. 1a) of the Vehicle and Traffic Law does not authorize the Commissioner to investigate an applicant's character or morals but only his "fitness", i.e., his ability to drive a car; second, that, as construed by the court, the statute is unconstitutional as a delegation of legislative power without standards (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184); and third, that the statute, as now construed and applied, violates the "privileges or immunities of citizens" provision of the Fourteenth Amendment to the Federal Constitution since it interferes with the common right to use the public highways (see *Williams* v. *Fears*, 179 U. S. 270, 274).

* * * * * *

Order affirmed. Memorandum opinion. All concur; Keating, J., in a separate memorandum except Desmond, Ch. J., Fuld and Van Voorhis, JJ., who dissent and vote to reverse in a separate memorandum.

APPENDIX B

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of March, in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding,

RAYMOND J. CANNON, Clerk.

Remittitur March 31, 1966.

No. 535

In the Matter of the Application

of

REUBEN KEMP, JR.,

Petitioner-Appellant,

For a Review of the Determination of WILLIAM S. HULTS, as Commissioner of the Bureau of Motor Vehicles,

Respondent-Respondent.

BE IT REMEMBERED, That on the 4th day of December in the year of our Lord one thousand nine hundred and sixty-five, Reuben Kemp, Jr., the appellant—in this cause, came

here unto the Court of Appeals, by Emanuel Redfield, his attorney and filed in the said court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William S. Hults, as Commissioner of the Bureau of Motor Vehicles, the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield of counsel for the appellant—, and by Mr. Michael H. Rauch of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, and by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,

Albany, March 31, 1966.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON,
Clerk.

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